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# In the Supreme Court of the United States

**No. 77-118**

PACIFIC ENGINEERING & PRODUCTION CO. OF NEVADA,
*Petitioner,*

vs.

KERR-McGEE CORPORATION AND
KERR-McGEE CHEMICAL CORPORATION,
*Respondents.*

## Petition for Rehearing

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## Petition for Rehearing

On October 3, 1977, this Court denied certiorari in a case in which the Court of Appeals sanctioned a seven-year period of continuous below-cost pricing by a gigantic firm having undisputed monopoly power and monopoly market shares, for the express purpose of excluding Petitioner from the relevant market, and in which, as the trial court found, Respondent's below-cost pricing was accompanied by numerous anti-competitive acts and practices. Based upon all the evidence, the trial court found that Respondent was motivated by a specific intent to monopolize and that Respondent had willfully acquired and maintained its mo-

nopoly power and monopoly market shares. The Court of Appeals in sanctioning Respondent's monopolistic power and abuse of that power committed numerous errors, three of which were presented in the Petition for Certiorari. In this Petition for Rehearing, Petitioner advances three grounds for further consideration by this Court that were available to it previously but were not presented because Petitioner believed the issues presented in the Petition so clearly warranted this Court's attention on the merits. One of the three issues now presented, although previously available, is prompted by intervening circumstances having a major impact on the nation economically.

The grounds upon which Petitioner seeks reconsideration of the Court's denial of Certiorari are as follows:

I. The Decision of the Court of Appeals in This Case Evidences a Growing Hostility Toward Private Enforcement of the Antitrust Laws—A Trend That Must Be Reviewed and Reversed.

II. The Court of Appeals' Adoption of Conclusively Legal Marginal Cost Pricing Conflicts with Congressional Declaration of Fair Pricing.

III. The Court of Appeals Flagrantly Violated the "Clearly Erroneous" Standard of Rule 52(a), Federal Rules of Civil Procedure.

## ARGUMENT

### I. The Decision of the Court of Appeals in This Case Evidences a Growing Hostility Toward Private Enforcement of the Anti-Trust Laws—a Trend That Must Be Reviewed and Reversed.

By its denial of certiorari in this case, the Court struck a debilitating blow to private antitrust enforcement. Among the matters of seeming great moment that came before the Court for review this session, this private antitrust action was apparently not thought significant enough to warrant the Court's attention.

The Court's denial left standing a decision that surely will become an open invitation for large, dominant firms in this country to destroy smaller rivals through vicious, predatory pricing activities. Today, with a national energy crisis at hand, the behavior of dominant firms in energy-related industries touches every citizen. The elimination of competition by dominant companies such as Respondent Kerr-McGee Corporation will cost the general public billions of dollars in higher, monopolistic product prices, and thousands of jobs in small businesses unable to withstand the vicious pricing activities present in this case.

In the two decades from 1948 to 1968, decisions of this Court in the antitrust field provided considerable illumination and guidance, to litigants and the lower courts alike, in interpreting and applying the antitrust laws so as to ensure preservation of competition and the protection of small business against monopolistic practices. In the line of authority cited by Petitioner in its Petition to this Court, including *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); and *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), this Court stood firmly behind the notion that the protection of competition required vigorous enforcement of the antitrust laws. That line of authority, however, has been so eroded in the last several years by decisions of the courts of appeals that one wonders, particularly after the decision of the Court of Appeals in this case, whether any protections are still available under the antitrust laws for a small business in this country.

Recent decisions, reported on an almost monthly bases, ignore prior antitrust authority, routinely overturn jury verdicts in antitrust cases, and set legal standards difficult, if not impossible, for antitrust plaintiffs to satisfy. This developing body of law

provides large, dominant firms such as Respondent with a hunting license against American small businesses.[1]

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1. *See for instance, Oreck Corp. v. Whirlpool Corp.*, 1977-2 Trade Cases Par. 61,641 (2d Cir. September 20, 1977) (overturning a jury verdict for $2.25 million and completely disregarding this Court's teaching regarding per se restraints in *United States v. General Motors*, 384 U.S. 127 (1966)); *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894 (10th Cir. 1975) (overturning a substantial plaintiff's verdict, requiring plaintiff to show "sinister" conduct—beyond "mere" intent to monopolize, and disregarding previously clear Section 2 standards announced in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Hanson v. Shell Oil Co.*, 1976-2 Trade Cases Par. 61,052 (9th Cir. 1976) (overturning a jury verdict exceeding $1 million, embracing the questionable doctrine that sales at or above "marginal" cost are presumptively lawful, and characterizing the plaintiff thusly, "Like many another loser in a competitive endeavor, he decided to try the antitrust laws as a means of shifting his losses to someone else," a remark hardly generous to antitrust enforcement); *International Air Indus. Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975) (upholding a verdict in favor of the defendants, also giving favorable reception to the "marginal" cost theory of pricing, upholding the exclusion of evidence from the defendant's files that a course of action chosen by the defendant would "deprive [the plaintiffs] of their present source of wood and possibly make it rather difficult for them to continue their operation," with the comment that such memoranda are of "little probative value"); *Yoder Bros. Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976) (affirming a directed verdict against an antitrust plaintiff and invoking various highly technical standards for a plaintiff to satisfy in establishing the requisite "dangerous probability of monopoly" and for sufficient evidence of "the relevant product market" to reach the jury); *Morning Pioneer Inc. v. Bismarck Tribune Co.*, 1974-1 Trade Cases Par. 74,956 (8th Cir. 1974) (affirming a trial court's holding that to establish an attempt to monopolize a plaintiff must show specific intent, overt anticompetitive acts and a dangerous probability of success by the defendant, and affirming an award of $1.00 (trebled) to the plaintiff); and *Chisholm Bros. Farm Equipment Co. v. International Harvester*, 498 F.2d 1137 (9th Cir. 1974) (affirming a directed verdict against an antitrust plaintiff, holding that specific intent "must be accompanied by predatory conduct directed to accomplishing the unlawful purpose," and reversing the usual burden of proof rule by stating the "evidence did not disclose that [defendant's] actions were not predominantly motivated by legitimate business objectives," Id. at 1144-45). *Cf., Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976) (reversing an order certifying a class of antitrust claimants, holding that "individual coercion" by a franchisor is a necessary element to be proved by *each* plaintiff).

While the foregoing authorities demonstrate a growing hostility among the courts of appeals toward enforcement of the antitrust laws, none of the recent decisions presents such a classic abuse of monopoly power as the instant case. With its denial of certiorari, the Court leaves standing in this case a court of appeals decision summarily reversing a plaintiff's verdict for some $5 million, which was based upon unrefuted findings, among others, that:

(1) Respondent Kerr-McGee possessed *actual monopoly power* —annual shares of the market ranging between 67% and 88%, plus power to control price and exclude competition.

(2) Kerr-McGee had the *specific intent to destroy competition or create a monopoly.*

(3) Kerr-McGee's sales were far below cost over a seven-year period, and were fixed *with the specific intent of driving Petitioner out of existence.*

(4) Kerr-McGee violated the Robinson-Patman Act by widespread contemporaneous sales of ammonium perchlorate at discriminatory prices.

(5) Kerr-McGee was able to subsidize its enormous ammonium perchlorate losses from its other profitable government business, and from the profitable sale of other products.

(6) Kerr-McGee management officials acknowledged that the company was pricing ammonium perchlorate on "the expectation of forcing [Petitioner] to shut down."

(7) Kerr-McGee maintained a pricing policy of raising prices when it appeared Petitioner was about to go out of business and leave Kerr-McGee with a monopoly, and lowering prices when Petitioner stayed alive.

(8) Kerr-McGee was guilty of a variety of other anticompetitive, "buccaneering" practices against Petitioner, including overt and covert intelligence activities, attempts to steal business already under contract to Petitioner, and attempts to destroy Petitioner's small business status.

Respondent Kerr-McGee is a firm with enormous economic power. The record shows that it has used that power in a malevolent manner to destroy a smaller rival, maintain its market control, and otherwise enhance its economic self-interest, against the general welfare.

Even the Court of Appeals agreed that Kerr-McGee selected and priced the product involved at levels far below full cost, with the knowledge and intent that Petitioner, a small, one-product company could not survive at those prices. Indeed, nowhere is the Court of Appeals' hostility toward private antitrust enforcement and the plight of Petitioner more evident than in its statement that "the other practices employed by [Kerr-McGee] inflicted no independent harm" and *"indicate nothing more than an intent that [Kerr-McGee's] pricing succeed in excluding [Petitioner] from the market."* (App. A., p. 11; emphasis added.) Such a cavalier approval of predatory pricing ought to be reviewed by this Court and summarily reversed. The courts of appeals and large corporations in this country ought to be notified once and for all time that pricing with the intent of driving out one's competitors will not be tolerated under the antitrust laws of the United States, particularly by a firm that has undisputed monopoly power.

As can be seen, the courts of appeals are manifesting increasing stinginess in permitting the Sherman Act—particularly Section 2—to work its beneficial effects on competition. Those courts have expressed a confusion, an uncertainty, and a failure to recognize the symptoms of monopoly power, symptoms that were already identified in such decisions as *Alcoa* and *Griffith*. This confusion and uncertainty stem from the lower courts' attempts in recent years to separate "good" monopolies from "bad" monopolies. Monopolization must be condemned, however, because its mere status is anticompetitive, and because the power of monopoly carries with it the grave potential of abuse. We had

always assumed that this principle is the mainstay of Section 2 doctrine. The Tenth Circuit Court of Appeals has declared otherwise.

Because these rulings by the courts of appeals "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States," certiorari is clearly warranted. *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. at 136.*

The Court is rarely confronted with an opportunity such as this case presents—to condemn the status of monopoly as being illegal, in order that the power of the monopolist be constrained. And rarely will the Court have before it such clear proof as here that certain monolithic American firms are indeed engaged in purposeful, anticompetitive conduct designed to thwart, destroy, suppress and eliminate smaller competitors.

The increasing judicial emasculation of Section 2 of the Sherman Act must end. This Court must declare a renewed commitment to the free marketplace and, more importantly, to the rights of those victimized by power and size. This case presents the Court with an opportunity to light the first candle in the process of reaffirming the values of antitrust enforcement in our free enterprise system.

## II. The Court of Appeals' Adoption of Conclusively Legal Marginal Cost Pricing Conflicts with Congressional Declaration of Fair Pricing.

Sales of imported steel products at prices ruinous to the domestic steel industry have received great attention in recent weeks.[2]

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2. E.g., *The Wall Street Journal,* Western Edition, September 20, 1977, p. 2, reporting cut-back of 5000 jobs in Youngstown, Ohio attributed to "low-price imported steel";

*The Wall Street Journal,* Western Edition, September 29, 1977, p. 4, reporting additional layoffs;

*The Wall Street Journal,* Western Edition, October 7, 1977, p. 8, reporting additional layoffs at two Detroit plants of National Steel Corporation attributed to "the heavy influx of foreign steel into Detroit ports. . . ."

The Secretary of the Treasury, acting under the Antidumping Act, 19 U.S.C. §§ 160, et seq., has preliminarily determined that certain major imported steel products have been sold below their fair value in violation of the Act. 42 Fed. Reg. 54489, et seq., October 6, 1977. "Fair Value" as the term is used in the Antidumping Act is defined by Congress as the prevailing price in the nation of origin or, if that price is below cost, a "constructed value." 19 U.S.C. Section 165 defines the "constructed value" as fully-allocated cost plus profit.

The purposes of the Sherman Act and the Antidumping Act are similar. The latter is intended to protect domestic industry from unfair competition injurious to industry and the national economy. Similarly, the Sherman Act, and especially Section 2, is designed to proscribe economic power and unfair tactics injurious to competition and the national economy. Although one is aimed at excessive concentrations of economic power and the use and abuse of that power, and the other at protection of domestic industry from predatory foreign competition, both are centrally concerned with the means of competition—whether competitive tactics are fair.

In the Antidumping Act, Congress has declared that sales below fully-allocated cost are unfair. The Court of Appeals in this case held sales below fully-allocated cost, over a long-run seven-year period, with intent to exclude a competitor, to be fair. The views of Congress and the Court of Appeals cannot be reconciled. Nor should they be, because the Court of Appeals is flatly wrong.

The destructive effects of sales below cost by big businesses to eliminate their smaller competitors, as in this case, are not all different from the destructive effects of below-cost imports. Thousands of steel-workers have been added to the ranks of the unemployed because of the unfair prices of imported steel products. In like manner extensive unemployment will result from concentrations of economic power following the collapse of small businesses unable to subsidize the below-cost pricing available to the industrial giants like Respondent Kerr-McGee Corporation.

Why should the courts allow the very forms of insidious and destructive competitive conduct by domestic firms that are foreclosed by Congress when attempted by foreign firms? The Court of Appeals has sanctioned purposeful exclusion of small businesses by their wealthier competitors. Judges and lawyers may understand that this Court's denial of certiorari represents no endorsement of the Court of Appeals' position. Businessmen may be expected to view the matter otherwise, however, and to act on the promise of the erroneous decision of the Court of Appeals. That decision is bad law. It should be plainly rejected by this Court.

## III. The Court of Appeals Flagrantly Violated the "Clearly Erroneous" Standard of Rule 52(a), Federal Rules of Civil Procedure.

The trial court, in its liability opinion, found:

> [T]he plaintiff must prove that the defendant had the specific intent to destroy competition or create a monopoly, that the defendant took overt acts pursuant to this intent, and that a dangerous probability of monopoly existed. . . .
>
> In the case at bar, the primary question is whether AMPOT possessed the requisite specific intent. . . .
>
> As is claimed by PE there is ample evidence of predatory intent. The most convincing evidence is the fact that all of Kerr-McGee Chemical Corporation's and its predecessor's major sales during and for some years prior to the four year and nine month damage period were below cost. . . .
>
> Historically, it does not take a great deal of evidence to prove this intent when a company has sold below cost. AMPOT's extended below cost selling combined with its other acts provide the specific intent in the case at bar. . . .
>
> It is not just the sales below cost, however, which convince us that AMPOT and its successor possessed the requisite predatory intent. Kerr-McGee's other activities are equally persuasive. (App. B, pp. 59-61.)

## CERTIFICATE OF SERVICE

Pursuant to Rule 33, subdivision 3(b), of the Supreme Court Rules, the undersigned, a member of the Bar of the Supreme Court of the United States, having duly entered his appearance in the foregoing cause as counsel of record, hereby certifies that, in conformity with Rule 33, subdivision 1, the foregoing Petition was served upon Respondents Kerr-McGee Corporation and Kerr-McGee Chemical Corporation by depositing three copies thereof in the United States Mails, with air mail postage prepaid, addressed to Respondents' counsel of record as follows, this 28th day of October, 1977:

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